

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )

E-SAT, Inc. )

Petition for Rulemaking to Establish Rules  
for Licensing Second-Round Applicants  
in the Non-Voice, Non-Geostationary  
Mobile Satellite Service )

File No. RM-\_\_\_\_\_

DOCKET FILE COPY ORIGINAL

**MOTION TO DISMISS**

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Dated: February 26, 1996

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### **Executive Summary**

Leo One USA believes that the E-SAT Petition should be dismissed for a number of reasons. First, the Petition is premature in the absence of the Commission's determination that its existing Rules are inadequate to process second round NVNG MSS applications. Section 1.401(e) of the Commission's Rules, 47 C.F.R. §1.401(e), provides that a premature Petition for Rulemaking should be dismissed. Second, as a technical matter, the Petition does not propose any specific Rules as required by Section 1.401(c) of the Commission's Rules, 47 C.F.R. §1.401(c). Third, contrary to E-SAT's assertion, delay in processing the second round NVNG MSS would hinder, not help, the United States' efforts to obtain additional NVNG MSS frequency allocations at WRC-97. For all of these reasons, Leo One USA urges the Commission to dismiss the E-SAT Petition.

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| Mobile Satellite Service                   | ) |                   |

**MOTION TO DISMISS**

Leo One USA Corporation ("Leo One USA"), by its attorneys, pursuant to §1.401(e) of the Commission's Rules, 47 C.F.R. § 1.401(e), hereby submits this Motion to Dismiss E-SAT, Inc.'s ("E-SAT") February 14, 1996 Petition for Rulemaking ("Petition"). E-SAT has petitioned the Commission to initiate a rulemaking proceeding regarding the processing of the pending applications to construct, launch and operate Non-Voice, Non-Geostationary Mobile Satellite Service ("NVNG MSS") systems.

Leo One USA strongly opposes the Commission's consideration of the E-SAT Petition. The Commission has existing Rules and policies in place to process the pending NVNG MSS applications; until the Commission applies these Rules and policies, it is impossible to determine whether mutual exclusivity exists between the pending applicants or that the existing Rules are inadequate.

Additionally, Leo One USA strongly disagrees with E-SAT's presumption that deferring the pending NVNG MSS applications will assist the United States in obtaining additional allocations for the NVNG MSS at WRC-97. To the contrary, if licenses are granted to pending applicants, it

will create a better environment for United States NVNG MSS proponents to obtain international partners. A broad range of international partners of NVNG MSS systems will best assist the United States' efforts to create the level of support necessary to achieve additional frequency allocations at WRC-97.

Leo One USA submits that the E-SAT Petition is premature and does not warrant further consideration at this time. Instead of wasting precious Commission resources on premature filings, Leo One USA, as it has stated on numerous occasions during the past year, again urges the Commission to immediately use its limited resources to process the pending applications according to the existing Rules for this service.

## **I. BACKGROUND**

Leo One USA has a pending application to construct, launch and operate a NVNG MSS system. Leo One USA began to design its proposed NVNG MSS system in 1992 and filed its application with the Commission in October 1993. The Leo One USA October 1993 application triggered the second NVNG MSS processing round. E-SAT filed an NVNG MSS application with the Commission on November 16, 1994 in response to the FCC's Public Notice announcing the acceptance for filing of the Leo One USA application.<sup>1/</sup> Given Leo One USA's pending application, it has a direct interest in the outcome of the E-SAT petition.

On February 14, 1996 E-SAT submitted to the FCC the referenced Petition for Rulemaking ostensibly to develop regulations for the processing of Second Round applications in the NVNG

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<sup>1/</sup> See Public Notice, Report No. DS-1459, DA 94-1011 (released September 16, 1994).

MSS. In its Petition, E-SAT states that the need for a formal rulemaking is driven by the scarcity of spectrum available both domestically and internationally for the NVNG MSS. Specifically, it concludes that current allocations may be sufficient to support only one or two systems . . . .” E-SAT claims that it would not be in the public interest to grant some applications and dismiss others until the Commission determines how much spectrum is available. The Petition specifically requests that the Commission delay any further consideration of the pending applications until after a rulemaking is conducted to develop Rules for processing Second Round NVNG MSS applications. E-SAT asks the Commission to develop a licensing method for processing Second Round applications and to determine whether the existing NVNG MSS financial qualifications standard should be applied to the Second Round applicants. E-SAT does not specifically propose any new Rules in its petition.

Leo One USA believes that the E-SAT Petition should be dismissed for a number of reasons. First, the Petition is premature in the absence of the Commission's determination that its existing Rules are inadequate to process Second Round NVNG MSS applications. Section 1.401(e) of the Commission's Rules, 47 C.F.R. §1.401(e), provides that a premature Petition for Rulemaking should be dismissed. Second, as a technical matter, the Petition does not propose any specific Rules as required by Section 1.401(c) of the Commission's Rules, 47 C.F.R. §1.401(c). Third, contrary to E-SAT's assertion, delay in processing the Second Round NVNG MSS would hinder, not help, the United States' efforts to obtain additional NVNG MSS frequency allocations at WRC-97. For all of these reasons, Leo One USA urges the Commission to dismiss the E-SAT Petition.

## **II. THE E-SAT PETITION FOR RULEMAKING SHOULD BE DISMISSED FOR FAILURE TO COMPLY WITH SECTION 1.401 OF THE COMMISSION'S RULES**

The E-SAT Petition does not comply with the Commission's unambiguous requirements for a Petition for Rulemaking, as specified in Section 1.401 of the Commission's Rules. It therefore must be dismissed.

### **A. The E-SAT Petition is Premature**

Section 1.401(e) of the Commission's Rules states:

Petitions which are moot, premature, repetitive, frivolous or which plainly do not warrant consideration by the Commission may be denied or dismissed without prejudice to the petitioner.

The E-SAT petition is clearly premature. The presumption underlying the petition is that mutual exclusivity exists between the pending NVNG MSS applicants. However, the Commission has yet to determine mutual exclusivity for the second NVNG MSS processing round. Specifically, the Commission has not reviewed the applicants' qualifications or determined precisely how much spectrum will be available to the NVNG MSS.

Historically, the Commission has used its financial qualifications standards to determine which applicants are likely to implement their proposed satellite systems. The NVNG MSS applicant needs to demonstrate financial qualifications to construct, launch and operate for one year only a small portion (two satellites) of their proposed satellite network.<sup>2/</sup> This Rule provides a basis to determine which of the pending applicants is likely to implement an NVNG MSS system. A review

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<sup>2/</sup> In contrast, in the Fixed Satellite Service and Mobile Satellite Service, the applicant is required to demonstrate its ability to construct, launch and operate for one year the entire proposed satellite system. See 47 C.F.R. §25.140.

of the processing of applications of other FCC satellite services reveals that applicants that do not have access to financial resources will not be successful.<sup>3/</sup> The strict financial showing ensures that entities will not warehouse valuable spectrum. The Commission recently reiterated this view in its Report and Order in IB Docket No. 95-41 where it stated:

Our repeated experience is that applicants without ready access to needed financing have difficulty obtaining that financing, and that attempts are often unsuccessful. This has allowed applicants to hold orbital resources to the detriment of others willing and able to go forward immediately. This ultimately results in fewer choices to the public, and less competition.<sup>4/</sup>

No reason whatsoever has been proffered by any party to this proceeding refuting this view. Consequently, the Commission must first enforce its financial qualification standards for the NVNG MSS. Once this is completed, the Commission will be in a position to identify the eligible applicants and determine the spectrum requirements for the second NVNG MSS processing round. Until such time, it is premature for the Commission to initiate a rulemaking proceeding. If the Commission presumes that all applicants are qualified without actually applying the existing Rules or qualifications, it could result in a tremendous waste of precious administrative resources. Not only may the Commission unnecessarily develop new Rules or policies for the NVNG MSS, but it may commit significant resources to obtain allocations for financially unqualified applicants.

Additionally, a rulemaking proceeding is not necessary to determine the availability of spectrum for qualified Second Round applicants. The issue of spectrum availability revolves around

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<sup>3/</sup> Report and Order in CC Docket No. 95-41, released January 22, 1996.

<sup>4/</sup> *Id.* at paras 40-41.



access to the 137-138 MHz downlink band. The issue raised by this band is two-fold. The first part concerns Orbcomm's license modification request to move its channels within the 137-138 MHz band.<sup>5/</sup> Leo One USA has demonstrated that grant of the Orbcomm modification request would eliminate the availability of spectrum in 137-138 MHz band for new Second Round applicants.<sup>6/</sup> The issues presented by this modification application have been fully briefed at the FCC, and the modification application is currently ripe for Commission action. A rulemaking proceeding is not necessary to resolve the issues raised by the Orbcomm modification application. The second part involves questions as to the availability of the channels currently used by the Polar Orbit Earth Satellite ("POES") operated by the National Oceanic and Atmospheric Administration ("NOAA") for the NVNG MSS. There are four channels (e.g. 137.333-137.367 MHz, 137.485-137.515 MHz, 137.605-137.635 MHz and 137.753-137.787 MHz) currently occupied by the POES system that were originally to be made available to the NVNG MSS by January 1, 2000. NOAA has recently indicated that it may need those channels after that date. The question as to the availability of the POES channels in the 137-138 MHz is not an issue for a rulemaking proceeding. Rather, this issue should be resolved through discussions between the FCC and NOAA.

As is apparent from the above discussion, a rulemaking proceeding is premature because the Commission has yet to determine whether mutual exclusivity exists in the second processing round, and it is an inappropriate vehicle for considering the existing spectrum use issues. A rulemaking

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<sup>5/</sup> See Orbital Communications Corporation, Modification Application, File No. 5-SAT-ML-96, October 20, 1995.

<sup>6/</sup> See Leo One USA Petition to Deny and Reply Comments regarding Orbcomm modification.

proceeding regarding application processing would only be appropriate after the Commission reviews the applicant's qualifications and determines that the pending applications cannot be processed under the existing NVNG MSS Rules and policies. Likewise, a rulemaking on existing allocation issues is unnecessary. Given this situation, the E-SAT petition must be considered premature and should be dismissed.

**B. The E-SAT Petition Does Not Propose Any Rules**

Under the Commission's Rules, while any interested person may submit a petition for rulemaking, the "petition shall set forth the text or substance of the proposed Rule . . . ."<sup>7/</sup> The E-SAT petition merely raises issues without offering any specific solutions. It does not provide the "text or substance" of proposed Rules or even provide a general outline of a proposed Rule or policy. Consequently, the E-SAT petition is inconsistent on its face with § 1.401(c) of the Commission's Rules and must be dismissed.

**III. FAILURE TO PROCESS THE PENDING NVNG MSS APPLICATIONS WILL HARM THE UNITED STATES' POSITION AT WRC-97**

Leo One USA strongly disagrees with E-SAT that processing the pending NVNG MSS applications will harm the United States' efforts for WRC-97. To the contrary, Leo One USA believes that failure to process the pending applications will severely hamper the United States' efforts to obtain frequency allocations for the NVNG MSS at WRC-97. Leo One USA was an active participant at WRC-95. Through this experience it has become abundantly clear that without international partners, it will be extremely difficult, if not impossible, for the United States to obtain

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<sup>7/</sup> Id. at § 1.401(c).

NVNG MSS allocations at WRC-97. This view has been repeatedly expressed to Leo One USA by representatives from the FCC, State Department and NTIA. Leo One USA concurs with the view that international partners will be critical to obtaining allocations for the NVNG MSS at WRC-97. International partners are exceedingly important for the NVNG MSS because allocations will be sought in bands currently used extensively by both government and commercial interests throughout the world. International partners are the best means to get foreign administrations to take the microphone and support a U.S. proposed allocation for the NVNG MSS. Without in-country advocates effective at countering the arguments of entrenched existing users within a country, it is unlikely that many administrations will support allocations for the NVNG MSS at WRC-97.

The current Second Round applicants face significant impediments to entering into meaningful international partnership relationships at this time because none of the pending applicants has any idea whether it will receive a license to operate an economically viable NVNG MSS system. This includes equity relationships as well as agreements with potential service providers. The risks for a potential international equity investor are enormous. Today, that investor has no idea whether the applicant will have access to spectrum in the existing bands. If forced to wait until after WRC-97, the risks and uncertainties multiply. First, there is no guarantee that WRC-97 will allocate additional spectrum for this service. Second, even if WRC-97 does allocate spectrum, it could be a number of years before that spectrum is available to the NVNG MSS. Any downlink spectrum allocated by WRC-97 will likely not be available until well after the year 2000 because it will be necessary to transition existing users out of the newly allocated bands on a global basis. In both the downlink bands that are being considered for the NVNG MSS, it will take a

considerable amount of time to complete this transition. In the 401-406 MHz band, the RF front-end of the radiosondes and weather stations operating in this band must be changed throughout the world before the band can be used by the NVNG MSS. This is not a simple task since there is no international regulatory body that has the authority to force or coordinate such a change.<sup>8/</sup> Likewise, in the 387-390 MHz band, which is also being considered for the NVNG MSS downlink, there are over 25,000 Havequick military radios operating in the band.<sup>9/</sup> These radios will either need to be replaced or re-engineered before the 387-390 MHz band can be used by the NVNG MSS. Third, even if spectrum is available, it will still not be known if the individual applicant will receive a license that allows it access to enough spectrum to operate an economically viable system. It is well understood that high risk transactions are difficult to consummate; at minimum, it may preclude an applicant from entering into relationships with the most appropriate and influential partners in a particular country<sup>10/</sup>.

It is also highly unlikely that the applicant who does not know if and when it will get a license will be able to enter into a meaningful relationship with any potential international service providers. Even if a relationship could be developed, there is very little incentive for a potential service provider to risk political capital for a business that may never come to fruition. This existing

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<sup>8/</sup> This is different from the PCS fixed microwave problem where the FCC had the authority to mandate the change.

<sup>9/</sup> See Preliminary Spectrum Reallocation Report, U.S. Department of Commerce, National Telecommunications and Information Administration, February 1994 at 4-24.

<sup>10/</sup> It also may preclude entering into these agreements based on terms that allow the United States to structure the company in the future to allow efficient introduction of NVNG MSS throughout the world.

situation is not conducive to developing international partnership relationships that will result in vocal and active support at WRC-97.

On the other hand, an applicant that receives (or is likely to receive) a license will be able to establish relationships around the world. Additionally, if licenses are granted now, it is likely that all currently allocated NVNG MSS spectrum will be used by existing licensees. This will strengthen the United States' argument at WRC-97 on the need for additional frequency allocations. Moreover, it will provide additional incentive to existing NVNG MSS licensees to work diligently to support the United States' efforts to obtain those allocations. Given the above, the Commission must conclude that the processing of the pending NVNG MSS applications will help not hurt the United States efforts at WRC-97. It would create an environment that allows the United States NVNG MSS community to enter into meaningful international business relationships and successfully promote its interests in Geneva at WRC-97.

#### **IV. THE COMMISSION SHOULD IMMEDIATELY USE ITS EXISTING RULES TO PROCESS THE PENDING NVNG MSS APPLICATIONS**

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In 1993, the FCC adopted Rules for the NVNG MSS.<sup>11/</sup> These Rules specify financial qualifications, technical parameters and procedures for processing NVNG MSS applications. Leo One USA urges the Commission to immediately take the following steps, using its existing Rules, to process the pending NVNG MSS applications. First, the Commission should review now the qualifications of all pending NVNG MSS applicants. This should include legal, technical and financial qualifications as well as the eligibility of first round NVNG MSS applicants to participate

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<sup>11/</sup> See Report and Order in CC Docket No. 92-76, 8 FCC Rcd. 8450 (1993).

in the Second Round. If any of the applicants are determined to be unqualified, their applications should be immediately dismissed. This process will provide the Commission with a more precise idea of how much spectrum will be necessary to accommodate Second Round applicants. Moreover, if some applications are dismissed on qualifications issues, it may facilitate settlement among the qualified applicants. It will also provide the unqualified applicants an earlier determination of their standing at the FCC so they can judge how to proceed.

As a matter of equity, unqualified applicants should not be allowed to continue to complicate the Commission's consideration of the second NVNG MSS processing round. This would be contrary to the public interest of the existing policies of the Commission and the interests of the qualified applicants in promoting prompt regulatory action. The elimination of unqualified applicants improves the likelihood that a qualified applicant can be licensed which will ensure that the public is provided more choices and competition in the provision of these important satellite services.

Second, the Commission should develop a sharing plan in the 137-138 MHz band to accommodate additional entrants. As part of this process the Commission should resolve the issues raised by the October 20, 1995 Orbcomm modification application and should initiate discussions with NOAA to determine the availability of the four center channels in the 137-138 MHz band. Collectively, these actions will aid in the prompt resolution of the pending proceeding.

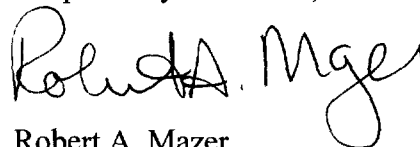
**V. DELAY IN PROCESSING THE PENDING NVNG MSS APPLICATIONS  
WOULD BE UNFAIR TO THE QUALIFIED APPLICANTS**

Further delay in processing the pending NVNG MSS application would be unfair to the qualified applicants and, as discussed above, would have a detrimental impact on the United States' position at WRC-97. Leo One USA based its decision to submit an NVNG MSS application, and prosecute that application on the representations of Orbcomm, Starsys, VITA and the Commission that frequency would be available to accommodate Second Round applicants. Failure to follow through with this representation would be manifestly unfair and merely undermine the integrity of the FCC's processes. If Leo One USA is forced to wait until spectrum is allocated by the WRC process, it is highly likely that Leo One USA will have had to wait at least 10 years from the date it submitted its application before it will be able to begin to provide service. Leo One USA therefore urges the Commission to immediately process the pending applications. To do otherwise, would retard the ability of the United States to promote the development of new telecommunication technology and services throughout the world. Most importantly, it would deny the public access to new competitive and innovative telecommunications technology and services.

**VI. CONCLUSION**

As is demonstrated above, the E-SAT Petition for Rulemaking does not comply with the Commission's Rule, and it should therefore be immediately dismissed. Furthermore, Leo One USA believes that the expeditious processing of the pending applications will be the best mechanism available to insure that additional allocations are provided to the NVNG MSS at WRC-97. Finally, the Commission should use its existing Rules to immediately process the pending NVNG MSS applications.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert A. Mazer". The signature is fluid and cursive, with the first name "Robert" and last name "Mazer" clearly distinguishable.

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Dated: February 26, 1996

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Dismiss of Leo One USA Corporation was sent by first-class mail, postage prepaid, this 26th day of February 1996, to each of the following:

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